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Legal Status and Rights of Undocumented Workers: Advisory Opinion OC-18

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INTERNATIONAL DECISIONS

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*Rights of undocumented workers—human rights—nondiscrimination—*jus cogens*—inter-American system*

LEGAL STATUS AND RIGHTS OF UNDOCUMENTED WORKERS. ADVISORY OPINION OC-18/03. *At* <http://www.corteidh.or.cr/seriea_ing/index.html>.
Inter-American Court of Human Rights, September 17, 2003.

In Advisory Opinion OC-18 of September 17, 2003,[1] the Inter-American Court of Human Rights ruled that international principles of nondiscrimination prohibit discriminating against undocumented migrant workers in the terms and conditions of work. The Court acknowledged that governments have the sovereign right to deny employment to undocumented immigrants, but held that such workers are equally protected by human rights in the workplace once an employment relationship is initiated. In other words, states may not further their immigration policies by denying basic workplace protections to undocumented employees.

The advisory opinion was issued in response to a request by the government of Mexico, which alleged that the denial of fundamental workplace rights to unauthorized workers in the Americas violated principles of nondiscrimination and equality before the law, as well as other *erga omnes* norms of international human rights law. Mexico argued that discrimination based on a worker's legal status could also encourage employers to deny undocumented workers other workplace protections, such as overtime, seniority, wages for work performed, and maternity leave.[2] Mexico did not target the practices of any particular state in its request for an advisory opinion. But the request appeared to be a response to the decision of the U.S. Supreme Court a month and a half earlier in *Hoffman Plastic Compounds v. NLRB*,[3] which held that undocumented workers were not entitled to back pay under the National Labor Relations Act as a remedy for wrongful termination for union activity. In any event, the question before the Inter-American Court had broad implications for migrant workers throughout the region, and the case attracted significant attention from other members of the Organization of American States (OAS).[4]

In a unanimous opinion with four concurrences, the Court found that the principles of equality and nondiscrimination are widely respected in international and regional human rights instruments and enjoy the status of *jus cogens*, or peremptory human rights norms.[5] The Court further

[1] Juridical Condition and Rights of the Undocumented Migrants, Advisory Opinion OC-18/03 (Inter-Am. Ct. H.R. Sept. 17, 2003) [hereinafter Advisory opinion]. The advisory opinions and other decisions of the Inter-American Court of Human Rights are available at <http://www.corteidh.or.cr/juris_ing/index.html>.

[2] Advisory opinion, *supra* note 1, para. 2.

[3] 535 U.S. 137 (2002). Since the United States has the world's largest population of undocumented workers, and over half of those workers are from Mexico, the status of Mexican migrant workers in the United States figures prominently in the overall conditions confronting migrant workers in the Americas.

[4] Canada, Costa Rica, El Salvador, Honduras, and Nicaragua submitted amicus briefs and oral interventions, whereas Argentina, Brazil, the Dominican Republic, Panama, Paraguay, Peru, and Uruguay attended as observers. Advisory opinion, *supra* note 1, paras. 7–48.

[5] *Id.*, para. 101. The Court based its decision on, inter alia, the nondiscrimination and equal protection provisions of the American Declaration on the Rights and Duties of Man, the American Convention on Human Rights, the International Covenant on Civil and Political Rights, the OAS Charter, and the Universal Declaration of Human Rights. *See* Advisory opinion, *supra* note 1, para. 86 & n.33.

found that nondiscrimination prohibits the denial of human rights to aliens on the basis of their migratory status.[6]

The Court emphasized the particularly vulnerable position of migrant workers—due to their absence from their states of origin, coupled with the associated "differences of language, custom and culture, as well as the economic and social difficulties."[7] The Court observed that employers may exploit migrant workers by offering them less favorable working conditions, offering them lower pay, dismissing them for joining unions, and threatening to deport them, and that irregular immigration status may frustrate workers' ability to obtain judicial recourse.[8]

Invoking both its own existing jurisprudence on nondiscrimination and that of other human rights bodies,[9] the Court ruled that states may distinguish between undocumented migrants, on the one hand, and either documented migrants or nationals, on the other, based on distinctions that are "reasonable, objective, proportionate and do[ ] not harm human rights."[10] The Court recognized that states may deny immigrants some political rights, regulate the entry and deportation of undocumented immigrants, grant or deny them permission to work, and regulate the entry and residence of guest workers in particular economic sectors, as long as such distinctions comport with due process and do not violate the workers' human rights.[11] The Court further acknowledged that neither states nor private individuals are obligated to hire undocumented workers.[12]

The Court ruled, however, that once an employment relationship is established with an undocumented worker, "the migrant acquires rights as a worker, which must be recognized and guaranteed, irrespective of his regular or irregular status in the State of employment."[13] These rights arise as "a consequence of the employment relationship."[14] Thus, states not only may not deny undocumented workers the human rights that arise from the employment relationship;[15] they have a positive obligation to ensure that those rights are not denied by private parties.[16]

The Court did not purport to present an exhaustive definition of human rights in the workplace, though it observed that the obligation not to discriminate extends beyond the four core labor rights identified by the International Labor Organization (ILO) (that is, nondiscrimination, the prohibition against forced labor, the prohibition against child labor, and freedom of association and the rights to organize and bargain collectively) and includes the payment of fair wages for work performed, reasonable working hours, safe and healthy working conditions, social security, a right to rest and compensation, protection for women workers, judicial and administrative guarantees,[17] access to state health services, and contributions to state pension systems.[18] The Court portrayed these rights as "inalienable" and necessary to ensure the dignity of worker and their families.[19]

Likely as a response to the ruling in *Hoffman*, the Court placed particular emphasis on the obligation to provide due process and unrestricted access to effective judicial remedies to migrant workers for violations of workplace rights.[20] The obligation to provide effective legal

[6] Advisory opinion, *supra* note 1, para. 106.

[7] *Id.*, para. 114 (quoting General Assembly Resolution (on "Protection of Migrants"), *see infra* note 34 and accompanying text).

[8] *Id.*, paras. 132, 159.

[9] *Id.*, paras. 82–95.

[10] *Id.*, para. 119.

[11] *Id.*, paras. 119, 169.

[12] *Id.*, para. 135.

[13] *Id.*, para. 134.

[14] *Id.*

[15] *Id.*, paras. 134–36.

[16] *Id.*, paras. 147–49.

[17] *Id.*, para. 157.

[18] *Id.*, paras. 150, 154.

[19] *Id.*, paras. 157–58.

[20] *Id.*, paras. 107–08, 121.

remedies is not merely formal: when fear of deportation or denial of free public legal services to immigrants prevents immigrants from asserting their rights, the right to judicial protection is violated.[21]

* * * *

Advisory Opinion OC-18 constitutes a significant international law development in at least two respects. Although the prohibition against discrimination is widely recognized as a fundamental right—both in the workplace and elsewhere—the decision represents the first time that an international tribunal has recognized nondiscrimination as a *jus cogens* norm, imposing obligations *erga omnes* on states. That declaration itself is likely to have broad implications for the future development of international human rights law, particularly in the Americas.

Moreover, OC-18 is an important pronouncement regarding the human rights of aliens and constitutes the most extensive articulation to date of the workplace rights of undocumented workers. As such, it will help to fill the significant gap that exists in international protection for persons who cross borders for employment. This failure on the part of international law has become especially acute as transnational migration for employment has become a growing global phenomenon.

International law regarding the rights of aliens, and particularly of undocumented aliens, is relatively underdeveloped. The International Convention on the Protection of the Rights of All Migrant Workers and Their Families enshrines the general principle that migrant workers are entitled to human rights regardless of their legal status and acknowledges some workplace protections for undocumented migrants, but the Convention excludes unauthorized workers from other workplace protections that the Court in OC-18 found to be fundamental.[22] The Convention also has not been widely ratified—particularly by the migrant-receiving states that would be capable of providing such protections.[23]

With rare exceptions, other international human rights instruments do not expressly address the rights of migrant workers. In general, international instruments explicitly prohibit discrimination on the basis of national and social origin or "other status" without specifically addressing citizenship, alienage, or immigration status.[24] Human rights instruments nevertheless imply protection for undocumented workers by generally providing that "all persons" are equal before the law and entitled to the instruments' substantive protections. Accordingly, the UN Human Rights Committee has concluded that most of the provisions of the International Covenant on Civil and Political Rights[25] (ICCPR) generally apply to all persons in a state's territory, including aliens who are not legally present.[26]

[21] *Id.*, para. 126.

[22] The Convention, GA RES. 45/158 (Dec. 18, 1990), provides that unauthorized migrant workers are entitled to nondiscrimination and equality before the law (Articles 7, 18), protection from slavery and forced labor (Article 11), and equal treatment with respect to remuneration, overtime, hours of work, weekly rest, holidays with pay, health and safety, termination of the employment relationship, child labor, and restrictions on home work (Article 25). The Convention affords undocumented workers permission only to join, but not to form, trade unions (Article 26), and denies them equal protection with respect to, inter alia, vocational training and access to social and health services (Article 43) and unemployment benefits (Article 54).

[23] As of April 7, 2005, there were twenty-eight states parties to the Convention, which went into force in July 2003. Most of those are migrant-sending, rather than migrant-receiving, states. *See* Present State of Ratifications and Signatures of the UN Migration Convention, *at* <http://www.unesco.org/migration/>.

[24] *See, e.g.*, International Covenant on Civil and Political Rights, Dec. 16, 1966, Art. 26, 999 UNTS 171; Gueye v. France, Communication No. 196/1985, CCPR/C/35/D/196/1985 (1989) (finding that France's denial of military pensions to noncitizens constituted discrimination based on "other status" under ICCPR Article 26).

[25] *See supra* note 24.

[26] Human Rights Committee, General Comment 15, The Position of Aliens Under the Covenant (Twenty-seventh Session, 1986), Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, paras. 1–2, UN Doc. HRI\GEN\1\Rev.1 at 18 (1994), *available at* <http://hei.unige.ch/humanrts/gencomm/hrcomms.htm> (discussed in Advisory opinion at para. 94).

The ILO likewise has interpreted the ILO Migrant Workers Convention (No. 143)[27] and Recommendation (No. 151)[28] as providing that workers' undocumented status does not deprive them of rights with respect to work actually performed.[29] The ILO reasoned that all migrant workers are entitled to equal treatment with respect to "basic human rights"[30]—including the four core ILO worker rights, their eight accompanying conventions, and the fundamental human rights contained in UN instruments.[31] The ILO previously had held that freedom of association[32] is a fundamental right that cannot be denied to migrant workers based on their legal status, and had suggested that principles of nondiscrimination in employment apply to non-nationals, including undocumented workers.[33]

Finally, the UN General Assembly has emphasized the need for all nations to protect the universal human rights of migrants, regardless of their legal status,[34] and has declared specifically that all aliens are entitled to equality before the courts and tribunals, to trade union rights, and to the rights to education, medical care, social security, and safe and healthy working conditions.[35]

The holding in OC-18 is consistent with these prior developments recognizing that undocumented workers are protected by nondiscrimination and other fundamental human rights. The decision goes significantly further than existing pronouncements, however, in affirming the right of undocumented immigrants to fundamental human rights protections, in using nondiscrimination as the mechanism for recognizing such protections for migrants, and in the breadth of the rights deemed sufficiently fundamental to preclude discrimination on the basis of immigration status.

[27] ILO Convention (No. 143) Concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers, June 24, 1975 [hereinafter Migrant Workers Convention]. ILO legal materials are available online at <http://www.ilo.org/ilolex/>.

[28] ILO Recommendation (No. 151) Concerning Migrant Workers, June 24, 1975.

[29] International Labour Office Governing Body, Report of the Director-General: First Suplementary Report: Opinions Relative to the Decisions of the International Labour Conference, para. 7, ILO Doc. GB.285/18/1 (2002), *available at* <http://www.ilo.org/public/english/standards/relm/gb/docs/gb285/> [hereinafter Opinion on the Rights of Migrant Workers]. Recommendation 151 regarding the rights of migrant workers, *supra* note 28, paras. 8(2), 34, provides that irregular migrant workers are entitled to equality of treatment with respect to trade union rights, remuneration for work performed, severance payments, and workers' compensation benefits.

[30] Opinion on the Rights of Migrant Workers, *supra* note 29, para. 8 (quoting Migrant Workers Convention, *supra* note 27, Art. 1).

[31] *Id.*, para. 11.

[32] ILO Committee on Freedom of Association, Complaint Against the Government of Spain Presented by General Union of Workers of Spain (UGT), Case No. 2121, paras. 559–61, *in* 327th Report of the Committee on Freedom of Association, ILO Doc. GB.283/8, para. 548 (Mar. 2001), *available at* <http://www.ilo.org/public/english/standards/relm/gb/docs/gb283/> (Spanish law allowing only documented foreign workers to exercise trade union rights violated freedom of association). Following the U.S. Supreme Court decision in the *Hoffman* case, the ILO Committee on Freedom of Association reiterated this view in Complaints Against the Government of the United States Presented by the American Federation of Labor and Congress of Industrial Organization (AFL-CIO) and the Confederation of Mexican Workers (CTM), Case No. 2227, para. 610, *in* 332nd Report of the Committee on Freedom on Association, ILO Doc. GB.288/7, para. 551 (Nov. 2003), *available at* <http://www.ilo.org/public/english/standards/relm/gb/docs/gb288/> (finding that the remaining remedies available to undocumented workers for illegal dismissals through the National Labor Relations Board were "inadequate to ensure effective protection against acts of anti-union discrimination").

[33] See, for example, the following reports by the ILO Committee of Experts on the Application of Conventions and Recommendations: Individual Direct Request Concerning Convention No. 111, Antigua and Barbuda, 2000, para. 6 (noting with approval that national employment law did not discriminate on the basis of alienage or nationality); Individual Direct Request Concerning Convention No. 111, Poland, 1992, para. 7 (requesting information regarding equality of treatment in employment of non-Polish nationals); and Individual Observation Concerning Convention No. 111, Denmark, 1991 (noting that discrimination against foreign nationals on grounds other than residence and nationality is prohibited by ILO Convention No. 111 (nondiscrimination)). Reports of the Committee of Experts, organized by country or convention, are available at <http://webfusion.ilo.org/public/db/standards/normes/appl/index.cfm?lang=EN>. The ILO materials referred to here were briefed extensively and also summarized in the Court's discussion of the amicus materials, but were not expressly relied upon by the Court.

[34] Protection of Migrants, GA Res. 54/166, para. 4 (Feb. 24, 2000) (discussed in Advisory opinion at paras. 114–15).

[35] Declaration on the Human Rights of Individuals Who Are Not Nationals of the Country in Which They Live, GA Res. 40/144 (Dec. 13, 1985).

The opinion in OC-18 does not offer any concrete basis for determining which workplace rights are "inalienable" human rights that cannot be denied on the basis of migration status and which are not. The clear import of the decision, at a minimum, is that workplace protections broadly relating to work actually performed—including workers' compensation, benefits representing worker contributions (relating to, for example, social security, unemployment compensation, or pension funds), and remedies for wrongful termination—may not be denied to workers performing such work and making such contributions.

It is important to note, however, that other than nondiscrimination and due process, the Court did not identify specific workplace protections that *must* be afforded to migrant workers. By approaching the question through the lens of nondiscrimination, the Court simply ruled that migrant workers could not be denied protections that a particular state affords to other, legally authorized workers. As a consequence, the implications of OC-18 for migrant workers will be more significant in countries with robust worker protections. Undocumented workers in U.S. agriculture, for example, could be denied any federal right to unionize because federal law exempts all agricultural workers from such protection. Various international human rights instruments, however—including the International Covenant on Economic, Social and Cultural Rights,[36] the ICCPR, and the eight core ILO Conventions—independently obligate states to protect freedom of association and other fundamental workplace rights.

The Court's conclusion that the principle of nondiscrimination is a *jus cogens* norm that applies equally to unauthorized immigrant workers doubtless will be further developed in future cases before the Inter-American Court involving the twenty-five countries that have accepted the Court's contentious jurisdiction.[37] The decision also is persuasive authority that can serve as an interpretive tool for other national and international courts, tribunals, organizations, and legislatures. The UN Human Rights Commission, for example, already has invoked OC-18 in a recent resolution on the human rights of migrants.[38]

The practical implications of the decision for countries such as the United States and Canada, which have not accepted the Court's jurisdiction,[39] are less clear. The reasoning of the opinion would appear to invalidate a number of legal regimes in the United States that discriminate on the basis of work authorization, immigrant status, or alienage, including: the denial of meaningful remedies to undocumented workers for violations of freedom of association under *Hoffman*; denial of workers' compensation and vocational-rehabilitation benefits to undocumented workers; many of the restrictions on the rights of H-2A and other guest workers; restrictions on death benefits to nonresident alien beneficiaries; denial of social security and pension benefits; and the denial of federally funded legal services representation to undocumented workers.[40]

Although the Court's decision is not binding on the United States, it represents an authoritative interpretation of U.S. obligations under the American Declaration of the Rights and Duties of Man, as well as an interpretation of U.S. obligations under the ICCPR. Under the *Charming Betsy* principle, statutes are to be interpreted, insofar as possible, to be consistent with U.S. treaty and customary international law obligations.[41] The decision in OC-18 therefore could be utilized to help prevent the spread of the *Hoffman* analysis to Title VII remedies, workers' compensation,

[36] Dec. 16, 1966, 999 UNTS 3.

[37] As of April 8, 2005, the countries that have ratified the American Convention on Human Rights and accepted the Court's contentious jurisdiction are Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Trinidad and Tobago, Uruguay, and Venezuela. *See* <http://www.oas.org/juridico/english/Sigs/b-32.html>.

[38] UN Comm'n on Human Rights Res. 2004/53 (Apr. 20, 2004); UN Doc. E/CN.4/RES/2004/53, *available at* <http://www.ohchr.org/english/bodies/chr/sessions/60/documents.htm>.

[39] It was presumably for this reason that Mexico sought an advisory opinion from the Court.

[40] For a detailed discussion of these workplace policies, see Sarah Cleveland, Beth Lyon, & Rebecca Smith, *Inter-American Court of Human Rights Amicus Curiae Brief: The United States Violates International Law When Labor Law Remedies Are Restricted Based on Workers' Migrant Status*, 1 SEATTLE J. SOC. JUST. 795, 812–22 (2003).

[41] Murray v. Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 118 (1804) ("an Act of Congress ought never to be construed to violate the law of nations if any other possible construction remains").

and other workplace protections, and to urge legislative or judicial reconsideration of *Hoffman* itself.[42] The decision could also play a role in ongoing legislative debates over the development and structure of new U.S. guest-worker programs and over restrictions on the provision of federally funded legal services. Advisory Opinion OC-18/03 already has formed the basis of a complaint against the United States before the Inter-American Commission on Human Rights[43]—which, under the OAS Charter, has authority to review actions of the United States. The Court's analysis could also be used to support claims under the Alien Tort Statute[44] based on the principles of nondiscrimination and equality before the law.

In sum, much in the Court's analysis remains to be worked out in future cases before that and other tribunals. But the decision represents a significant milestone in the development of international protections relating to both nondiscrimination and the rights of migrant workers.

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Eritrea Ethiopia Claims Commission—international armed conflict—state responsibility for international humanitarian law violations—Geneva Conventions of 1949—Hague Regulations of 1907—customary international humanitarian law—occupied territory—treatment of prisoners of war—treatment of civilians—conduct of military operations

PRISONERS OF WAR (ERITREA V. ETHIOPIA), ERITREA'S CLAIM 17/ETHIOPIA'S CLAIM 4, PARTIAL AWARDS. *At* <http://www.pca-cpa.org>.
Eritrea Ethiopia Claims Commission, July 1, 2003.

CENTRAL FRONT (ERITREA V. ETHIOPIA), ERITREA'S CLAIMS 2, 4, 6, 7, 8 & 22/ETHIOPIA'S CLAIM 2, PARTIAL AWARDS. *At* <http://www.pca-cpa.org>.
Eritrea Ethiopia Claims Commission, April 28, 2004.

In May 1998, a large-scale armed conflict commenced between the Federal Democratic Republic of Ethiopia (Ethiopia) and the State of Eritrea (Eritrea). At various times the armed forces of each side occupied the territory of the other. During the war, tens of thousands of civilians were displaced and approximately 3,700 soldiers were held as prisoners of war (POWs). Military hostilities were formally brought to an end by an agreement between Ethiopia and Eritrea signed in Algiers on December 12, 2000 (Agreement).[1] Under the Agreement, the parties committed themselves to establishing the Eritrea Ethiopia Claims Commission (Commission).[2] Essentially, the Commission was given the mandate to decide, through binding arbitration, claims concerning violations of international law relating to the armed conflict. The Agreement

[42] *See supra* note 3 and accompanying text.

[43] In March 2005, the commission received information regarding the rights of migrant workers in the United States, including both the impact of the *Hoffman* decision on the labor rights of undocumented migrant workers and the working conditions of Florida's migrant workers. *See* Inter-Am. C.H.R. Press Release 8/05, *at* <http://www.iachr.org/Comunicados/English/2005/8.05.htm>.

[44] 28 U.S.C. §1350.

[1] Agreement Between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea, Dec. 12, 2000, 40 ILM 260 (2001), [hereinafter Agreement]. The Agreement and the awards and decisions of the Eritrea Ethiopia Claims Commission (Commission) are available at <http://www.pca-cpa.org>.

[2] *See* Agreement, *supra* note 1, Art. 5. The Commission first met in March 2001. Pursuant to Article 5(12) of the Agreement, the Commission must endeavor to complete its work within three years from the closing date for the filing of claims. The Commission presently comprises Hans Van Houtte (president), George H. Aldrich (appointed by Ethiopia), John R. Crook (appointed by Eritrea), James C. N. Paul (appointed by Ethiopia), and Lucy Reed (appointed by Eritrea). The International Bureau of the Permanent Court of Arbitration at The Hague serves as the registry for the Commission. *See generally* Hans Van Houtte, Report to the Secretary-General on the Work of the Commission, UN Doc. S/2001/608, Annex II (June 7, 2001) [hereinafter Secretary-General's Progress Report 2001].